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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 746.

THE PENNSYLVANIA RAILROAD COMPANY, ERIE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, and THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, *Appellants*,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO, JOHN W. BRICKER, Attorney General of the State of Ohio, and PITTSBURGH COAL COMPANY, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE OHIO APPELLEES.

JOHN W. BRICKER,
DONALD C. POWER,
Solicitors for Appellees,
Attorney General of Ohio,
and
The Public Utilities Commission of Ohio.

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April 3, 1936.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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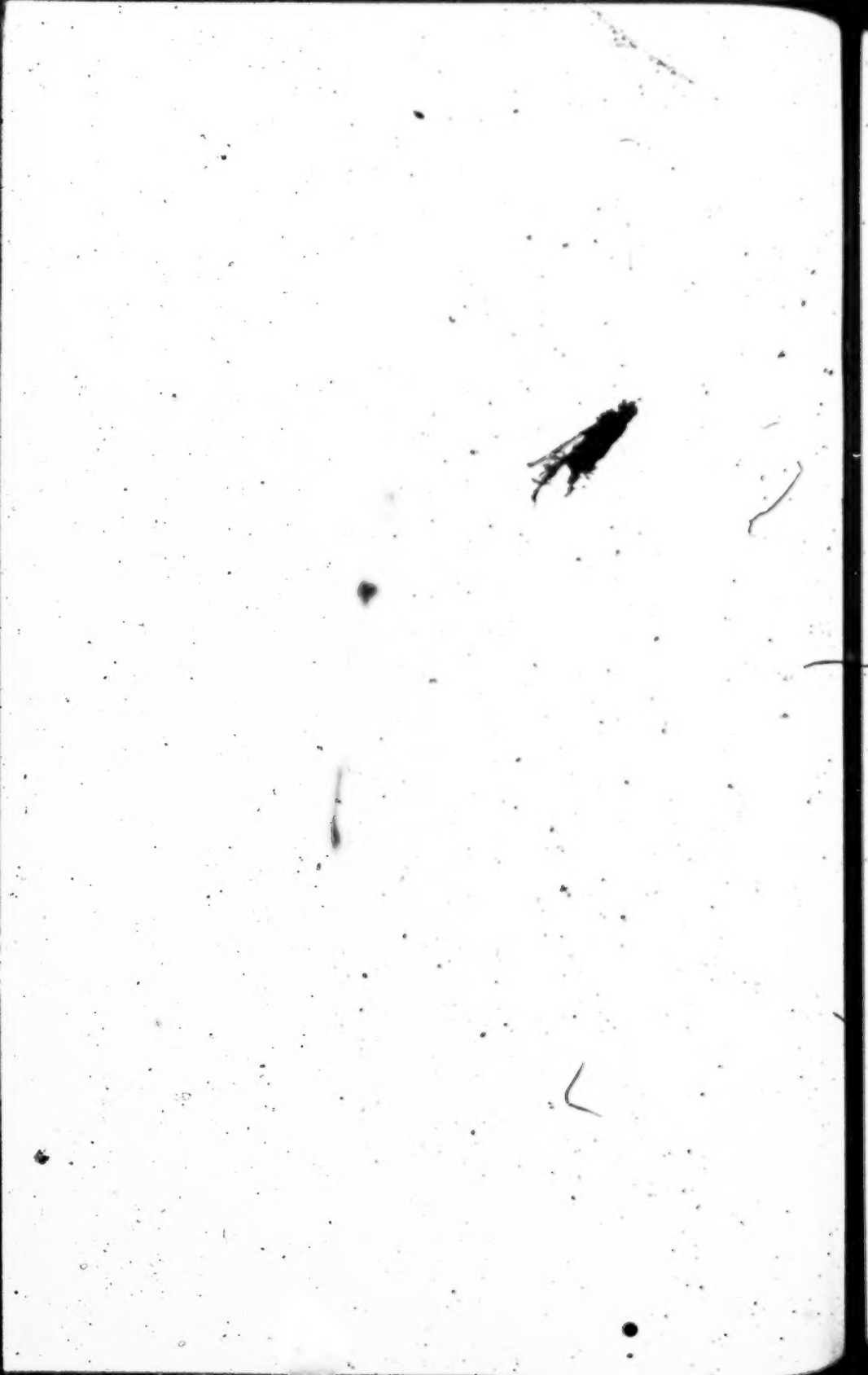

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE OHIO APPELLEES.

Statement.

This is an appeal from a decree of a specially constituted three-judge court of the Southern District of Ohio, Eastern Division (R. 69-70), which unanimously declined to hold

unlawful a certain order of The Public Utilities Commission of Ohio (R. 41-42) attacked by the appellants here as plaintiffs below, and ordered their petition to be dismissed. (R. 70)

a. The Issue.—The case presents but one question for determination by the Court. It may be stated thus:

> Is the commerce in the common carrier transportation of four certain carloads of bituminous coal from a shipper at Negley, Ohio, via an all-Ohio route to a consignee at Youngstown, Ohio, interstate commerce, subject to regulation by the Interstate Commerce Commission, or Ohio state commerce, subject to regulation by The Public Utilities Commission of Ohio?

The appellants, basing their contention upon facts not connected with the common carrier transportation, and having reference to matters which preceded it entirely, say that the commerce from Negley to Youngstown is interstate in character and subject to regulation and control by the Interstate Commerce Commission; the appellees, resting upon the *locus* of the common carrier transportation, and contending that no preceding matters in any way overcome the presumption that the character of the common carrier transportation is determined, in the first instance, by its *locus,* say that the commerce from Negley to Youngstown is intrastate in character, and subject to regulation and control by The Public Utilities Commission of Ohio.

The question awaiting the Court's determination arises out of the following facts:

The Pittsburgh, Lisbon & Western Railroad Company, a common carrier railroad (hereinafter referred to as the Lisbon) on September 17, 1934, received from the Pittsburgh Coal Company, a shipper, at Negley, Ohio, four certain carloads of bituminous coal, with instructions in the usual documentary form (R. 99, 109, 110, 111, 192B, 200,

201, 203) to transport the same via the joint connecting route of the Lisbon and The Youngstown and Suburban Railway Company, a common carrier railroad (hereinafter referred to as the Y. & S.) to Youngstown, Ohio, where the Y. & S. was to transfer the four cars to the Pennsylvania Railroad Company for transfer by the latter to the Erie Railroad Company, for delivery by the Erie to the consignees named in the shipping orders, in Youngstown.

The point of shipment, Negley, is a local point on the Lisbon; no other common carrier railroad reaches it. (R. 95, 96) The entire route from Negley to Youngstown, via the road hauls of the Lisbon and the Y. & S., and the switching hauls of the Pennsylvania and the Erie, right to the delivery points of the consignees, lies wholly within the State of Ohio. (R. 94-98, 103-104)

The transportation service was performed by the Lisbon and the Y. & S. in accordance with the shipper's instructions, and the Y. & S. on September 19, 1934, transferred the four cars to the Pennsylvania in the usual and customary manner of everyday operation by placing them on the Y. & S.-P. R. R. interchange track, and delivering to the Pennsylvania the usual and customary written instructions concerning the further transportation. (R. 98-115, 192A-204) Thereupon the Pennsylvania, instead of proceeding with the further transportation according to such instructions, returned the four cars to the Y. & S. by placing them upon P. R. R.-Y. & S. interchange track (R. 116-118) on September 21, 1934, and presented to the Y. & S. the following notice ante-dated September 18, 1934 (R. 116):

> "Effective at once this company will not accept shipments of bituminous coal carloads from the Youngstown & Suburban Railway at its interchange in Youngstown for delivery to individuals or industries on its own or connecting lines within the switching limits of Youngstown which do not originate at mines within the state of Ohio until all charges from its connection with the Youngstown and Suburban Railway to point of ulti-

mate delivery are fully prepaid at rates published in tariffs on file with the Interstate Commerce Commission."

The Pennsylvania had never theretofore required that the Y. & S. should pay any of the Pennsylvania's charges on any such interchanged freight "in advance," so to speak; instead, all charges of both carriers on freight handled from either to the other via this interchange had customarily been paid through a regular "interchange settlement" between the two carriers. (R. 182-183) Furthermore, compliance with the Pennsylvania's notice would have required the Y. & S. to pay for the switching at the rate of $1.89 *per ton*, as explained below, p. 5.

The Y. & S., upon receipt of the notice, tendered to the Pennsylvania the amounts lawfully due the Pennsylvania and the Erie under the schedules of rates and charges on file with The Public Utilites Commission of Ohio, for the intrastate switching of the four carloads of coal, and contemporaneously replaced the four cars on the Y. & S.-P. R. R. interchange track. (R. 116-118) This tender of the Ohio intrastate switching charges the Pennsylvania refused, and it replaced the four cars on the P. R. R.-Y. & S. interchange. (R. 114-118)

Upon the determination of the question of law here presented depends, first, the amount of the charges of the Pennsylvania and the Erie for switching this coal to the consignees in Youngstown; and second, whether or not the coal will be so switched at all.

As Ohio state commerce the switching charges would be, *per car*, $2.70 for the intermediate service of the Pennsylvania, and $4.95 for the delivery service of the Erie, or a total of $7.65 *per car*. (R. 116-117) These are the usual and normal charges for these particular switching movements in either state or interstate commerce on all commodities, *except coal, coke, iron ore and fluxing stone when*

moving in interstate commerce, from the Y. & S. to consignees on other lines in Youngstown. (R. 182)

As interstate commerce the switching charges would be, *per ton*, 76 cents for the intermediate service of the Pennsylvania, and $1.13 for the delivery service of the Erie, or a total of $1.89 *per ton*, equivalent to $94.50 for the standard car of 50 tons of bituminous coal. These are not switching rates at all, for none such are published by these trunk lines on such traffic. In lieu thereof, the switching charges are computed at the road-haul rates from Youngstown to the next destination beyond, in the direction of the switching movement. (R. 11-12, 181)

The maintenance of the rates in this fashion by the trunk lines is deliberate, and is part of a determination on their part not to switch to consignees on their lines in Youngstown, coal so brought into the city by the Y. & S. This the trunk lines admitted in another proceeding before the Ohio Commission pending there contemporaneously with this, and involving the lawfulness of the intrastate switching rates. (See *Post*, pp. 42-43.)

b. The Proceedings before the Ohio Commission.—Facing the situation just described, the Y. & S. as a carrier in possession of the four cars under the obligation of the bill-of-lading contract, filed with the Ohio Commission on September 29, 1934, its complaint against the Pennsylvania and the Erie. (R. 71) It charged that those defendants had "failed, omitted and neglected, and threaten to continue to fail, omit and neglect, without unreasonable delay to transfer, switch and deliver cars of bituminous coal, destined to a point on said Erie Railroad Company as a connecting line beyond said the Pennsylvania Railroad Company, in Ohio intrastate commerce," in violation of the General Code of Ohio. (R. 78) The relief prayed for was an order commanding the defendants "without unreasonable delay or discrimination to transfer, switch and deliver the four above-described carloads of bituminous coal and any other

carloads of bituminous coal likewise loaded, shipped and billed." (R. 79)

The Pennsylvania and the Erie answered individually, denying all the material allegations of the complaint (R. 79). There followed the usual hearing, promptly had on October 17-18, 1934, at which time the other Youngstown lines,—The Baltimore & Ohio Railroad Company, The Lake Erie & Eastern Railroad Company, The Pittsburgh & Lake Erie Railroad Company, and The New York Central Railroad Company,—appeared and intervened (R. 82). These interveners participated actively in the hearing, their counsel participated with defendants' counsel in cross-examining witnesses at length, and they joined with the named defendants in motions to dismiss the complaint upon jurisdictional grounds. (R. 184) The various named and intervening defendants will be jointly referred to herein as the trunk lines.

Upon this hearing evidence in support of the allegations of fact recited in the complaint before the Commission was introduced through the president of the Y. & S. (R. 93 *et seq.*) Additional evidence with respect to the operation of the coal company which shipped the coal from Negley, was given by its president at the invitation of the presiding commissioner. (R. 93, 144 *et seq.*) No witnesses were presented by the trunk lines, who took the position that, because the evidence submitted by the president of the coal company was a "very precise statement" (R. 155), and "explained all the facts as we understood them and as we intended to show them by secondary evidence" (R. 185) they had come to the conclusion that any evidence that they might offer would be "merely cumulative evidence." (R. 185) Accordingly, they announced that "the defendants and interveners therefore will rest upon the record as it is and upon our motion as just made." (R. 185) The motion was the one already mentioned, to dismiss the complaint on jurisdictional grounds, and was taken under advisement by the presiding commissioner. (R. 184-185)

The matter being thereafter submitted, the Commission on March 26, 1935, made its report and issued its order, originally scheduled to become effective on April 10, 1935. (R. 8, 41)[1] A petition for rehearing, filed by the trunk lines was denied by the Commission on April 8, 1935. The effective date of the order was extended from time to time, pending the determination of the subsequent proceedings in the District Court, until January 2, 1936. (R. 220)

It is this order of the Commission, dated March 26, 1935, which raises the question already stated (*ante*, p. 2), for decision by this Court.

c. The proceedings before the District Court.—Promptly after the denial by the Ohio Commission of reconsideration of its report and order, the trunk lines filed with the United States District Court for the Southern District of Ohio, Eastern Division, their Petition to Enjoin, etc., the order of the Commission. (R. 1)

The petition alleged that the trunk lines had been denied a fair and impartial hearing before the Commission (R. 6); that the Commission's order was not supported by proper and adequate findings (R. 6); that there was no substantial evidence before the Commission (R. 6); that the findings and order were against the manifest weight of the evidence and the overwhelming preponderance of the evidence (R. 6); that the Commission acted unreasonably and arbitrarily (R. 6); that the effect of the order of the Commission is to regulate and impose a burden upon interstate commerce (R. 5, 6); and that the order deprived the complainants of due process and equal protection of the law. (R. 6) It asked for interlocutory and permanent injunctive relief. (R. 7-8)

As will be observed from a comparison of the bill below and the assignments of error now filed, most of these contentions have been abandoned. In substance, the trunk

[1] The Youngstown and Suburban Railway, Complainant, v. The Pennsylvania Railroad Company and Erie Railroad Company, 1935 Annual Rep., P. U. C., Ohio.

lines come into this Court resting upon two propositions, first, that there was no substantial evidence before the Ohio Commission, and, second that the action of the Ohio Commission constitutes a regulation of interstate commerce. (R. 221-222, 229-231)

The District Court organized as required by statute with three judges, one a circuit judge, on December 11, 1935, handed down its decree sustaining the order of the Commission, denying the relief sought, and ordering the bill dismissed. (R. 69)[1] The two paragraph opinion embodied in the decree (R. 69-70) is short and to the point. The District Court supports the order of the Commission in all respects and agrees with the Commission in its understanding of the decisions of this Court which are pertinent to the issues here, and which likewise support the order of the Commission. (R. 69-70)

It may be observed that the appellants in their Statement as to Jurisdiction of this Court, recite that the decree below "was passed and entered March 11th, 1935." That date is an error. The judgment of the District Court was actually entered, as aforesaid, on December 11, 1935. (R. 69)

d. Prior Proceedings in this Court.—On December 31, 1935, the appellant trunk lines presented to a single judge of this Court their petition (R. 218), not theretofore served upon or brought to the notice of the appellees or any of them, which sought to maintain the *status quo* pending review by this Court of the action of the District Court, by staying the order of the Ohio Commission, which otherwise would have become effective on January 2, 1936. (R. 220) On December 31, 1935, an order was issued by Mr. Justice McReynolds staying the order of the Ohio Commission pending the prosecution of this appeal. (R. 220) This order, although telegraphic notice thereof was given by

[1] The Pennsylvania Railroad Co., et al., Complainants, v. The Public Utilities Commission of Ohio, et al., Defendants, decided Dec. 11, 1935, not yet reported.

the clerk on December 31, 1935, did not come to the attention of the appellees or any of them until January 2, 1936. The Y. & S., relying upon the order of the Ohio Commission, replaced the four cars in question on the Y. & S.-P. R. R. interchange track on the morning of January 2, 1936. Presumably because of the stay thus issued, the four cars were then again refused by the Pennsylvania and replaced by it on the P. R. R.-Y. & S. interchange. They now remain in the physical possession of the Y. & S.

Summary of Argument.

The real question presented for the Court's determination is the character of the commerce involved in the transportation from Negley to Youngstown,—is it Ohio intrastate commerce as its *locus* indicates, and as the Commission and the District Court both concluded, or is it interstate commerce?

Appellants contend that the transportation is in interstate commerce, because the coal involved was actually mined in the State of Pennsylvania and was transported into Ohio "pursuant to a continuing purpose and intent" on the part of the shipper and owner to sell or otherwise commercially dispose of it there or at destinations beyond.

The Commission found that the movement from the mine in Pennsylvania was of raw run-of-mine coal, owned throughout that movement by the mine operator, and moved by him in his privately owned facilities, to his own preparation plant at Negley; that there was no dealing in or with respect to the coal in the course of that private movement; that the private movement was not through and continuous; and that there was no commerce in the coal in the course of that private movement. It further found that the common carrier transportation from Negley to Youngstown was of coal prepared at Negley to meet the purchasers' specifications, and which could not have been so prepared elsewhere.

Applying to these facts the law laid down by this and other courts in such as the *Pipe Line cases*, the Commission concluded that the commerce incident to the common carrier transportation from Negley to Youngstown was intrastate, and subject to its jurisdiction, and quoted from the Circuit Court of Appeals in the *Campbell River Mills case* that:

> "The appellant cites no case in which a state commission has been found without power to regulate rates on intrastate shipments of goods brought into the state by agencies other than common carriers."

A secondary contention by the appellants is that the Commission lacked substantial evidentiary support for its conclusions of fact with respect to the movement of the raw run-of-mine coal from the mine in Pennsylvania to the preparation plant at Negley in Ohio. That particular evidence was all given by a representative of the owner of the coal, at the invitation of the Commission; these appellants as defendants before the Commission admitted that it was precise and frank, that it explained all the facts, and that it explained them all as appellants understood them and had themselves intended to show them. Appellants therefore offered no evidence themselves.

Obviously, upon such a record, appellants real secondary contention is that they disagree with the findings of the Commission upon that admittedly complete evidence. It is not necessary to cite authority for the proposition that the Court will not substitute its judgment on the facts for that of the Commission.

The Commission's order has the support of substantial evidence, adequate findings, and correct application of the law. It is a lawful order and the decree of the District Court upholding it should be affirmed.

Argument.

I. THERE WAS SUBSTANTIAL EVIDENCE BEFORE THE OHIO COMMISSION, NONE OF WHICH WAS IN ANY WISE CONTROVERTED, TO SUPPORT EVERY FINDING OF FACT MADE BY THE COMMISSION IN THE REPORT UPON WHICH ITS ORDER IS BASED.

(This has reference to Appellants' Assignment of Error 1.)

The attitude of the trunk lines as defendants before the Ohio Commission, their failure there to offer any evidence in chief, and the circumstances under which they declined then to offer such evidence, make it difficult to believe that their argument here, that the Commission lacked substantial evidence for support of its findings, is made in sincerity and good faith.

At the commencement of the hearing before the Commission, the trunk lines indicated that there was some doubt whether they would offer any evidence. Their doubt was apparently the result of a view that the complainant might not produce all the evidence which the trunk lines felt was in its possession. (R. 82) There was considerable discussion of this between counsel and the bench, as a result the presiding Commissioner asked that Mr. J. D. A. Morrow, President of the Pittsburgh Coal Company, the shipper of the four cars here directly involved, "make himself available to testify should you (*i. e.*, the trunk lines) desire to ask him any question." (R. 93)

Thereafter Mr. Morrow appeared and made a lengthy statement, not only with respect to the business of the Pittsburgh Coal Company as the shipper of the four cars, but generally with respect to its operation of coal mines in Pennsylvania; of towboats and barges on the upper Ohio river system of inland waterways; of its private track from Smith's Ferry, Pa., on the north bank of the

Ohio River, to Negley, Ohio; and of its coal processing plant at Negley, from which the four cars were shipped. (R. 144 *et seq.*)

At the conclusion of his testimony in chief by witness Morrow, counsel for the trunk lines characterized it as a "very precise statement" that would not require a great deal of cross-examination. (R. 155) Nevertheless, three of the four counsel for the trunk lines then proceeded to cross-examine witness Morrow at length, and his cross-examination and re-cross-examination occupy more of the record than do his direct and re-direct statements. (R. 155-168, 170-172)

Then, having had ample time over night to reflect on all that witness Morrow had said, counsel for the trunk lines when asked the next day if they had any testimony to offer, made reply as follows (R. 185):

> "Mr. Orcutt: Your Honor will recall that at the opening yesterday we were uncertain as to the amount of evidence which would be necessary. The amount of evidence which we felt would be necessary was dependent entirely upon how frankly the complainants presented the facts. After Mr. Morrow took the stand and explained all of the facts as we understood them and as we intended to show them by secondary evidence if the Pittsburgh Coal Company refused to present the best evidence, we discussed the matter last night and came to the conclusion that the evidence that we had would very largely be merely a repetition and cumulative of Mr. Morrow's statement. That being the case, we didn't wish to tax the time of this commission by putting in merely cumulative evidence. The defendants and intervenors therefore will rest upon the record as it is and upon our motion as just made."

We ask the Court to observe that witness Morrow's "very precise statement" was thus admitted by the trunk lines after ample opportunity to reflect upon it, to have presented and explained *all* the facts, and to have presented and explained them *as the trunk lines understood them* and

as they had themselves intended to show them. Yet they now contend that there is no substantial evidence of record to warrant the findings which the Ohio Commission made. We cannot refrain from again commenting that this contention can hardly be made in sincerity and good faith.

Doubtless the trunk lines prefer not to agree with the conclusions of fact which the Commission has drawn from that substantial evidence. That, however, is something entirely different from the contention that the Commission lacked substantial evidence for the conclusions which it did reach. It is not necessary in this Court to cite the mass of authority for the proposition that the Court will not substitute its judgment on the evidence for that of the Commission. *Florida* v. *United States,* 292 U. S. 1, 12. There are a host of authorities to the same effect concerning the review by the Supreme Court of Ohio of the action of the Ohio Commission respecting Ohio intrastate commerce, which is all that is here involved.

Settle et al., Partners, v. *The Public Utilities Commission of Ohio,* 94 O. S., 417, 419;

Pollitz et al. v. *The Public Utilities Commission of Ohio,* 96 O. S., 560, 565;

The Akron, Canton & Youngstown Railway Co. et al. v. *The Public Utilities Commission of Ohio,* 96 O. S., 359, 367;

The Lima Telephone & Telegraph Co. v. *The Public Utilities Commission of Ohio et al.,* 98 O. S., 110, 116;

The Hocking Valley Railway Co. v. *The Public Utilities Commission,* 100 O. S., 321, 326;

The Hardin-Wyandot Lighting Co. v. *The Public Utilities Commission,* 108 O. S., 207, 213, 214;

The Ohio Utilities Co. v. *The Public Utilities Commission,* 108 O. S., 143, 145;

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Lykins v. *Public Utilities Commission of Ohio*, 115 O. S., 376;
Granville & Newark Motor Service, Inc., v. *Public Utilities Commission of Ohio*, 119 O. S., 148;
West Ohio Gas Co. v. *Public Utilities Commission of Ohio*, 128 O. S. 301.

This same rule which has long guided this court and the Supreme Court of Ohio in review of the administrative action of rate regulating bodies, applies with equal force where the review is had incident to a conflict in regulation between the federal and state powers. See *Florida* v. *United States, supra*, p. 12.

There are but three findings of the Ohio Commission which appellants say lack substantial evidentiary support. These all have reference to the transactions involved in the movement of the coal up to Negley and do not relate in any respect to the common carrier transportation within the State of Ohio from Negley to Youngstown. In substance, appellants contend the Commission had no substantial evidence to support its findings (R. 221-222):

1. "That there was no dealing in or with respect to the coals involved in the course of their transportation from the mine in Pennsylvania, from Risher, in Pennsylvania, or from Smith's Ferry, in Pennsylvania, to Negley, in Ohio";
2. "That there was no through and continuous transportation from the mine (in Pennsylvania) to Negley (in Ohio)";
3. "That there was no commerce in the coal in the course of its transportation from mine to Negley."

It is first to be observed that the evidence before the Commission with respect to the movement of the coal up to Negley was the evidence of witness Morrow, President of the company which shipped the coal from Negley; in other words, it was this particular evidence which appellants admitted by statement of counsel before the Commission, was precisely and frankly given and showed all the facts as ap-

pellants understood them, and had intended themselves to show them.

That evidence, with respect to these three particular findings, may be summarized as follows:

The coal was originally mined in a so-called river mine owned and operated by the coal company. (R. 144-147, 151-154)

The coal throughout the movement from the mine, from Risher, Pa., or from Smith's Ferry, Pa., to Negley, remained in the ownership, possession and control of the Pittsburgh Coal Company. (R. 151-154, 160-162)

The coal company was also the owner of all the facilities employed in that movement. The evidence shows this to be true with respect to the private track of the coal company extending from the mine to the river tipple, a distance of 6.5 miles (R. 146, 151-152, 160-161, 169); it was true also with respect to the river tipple (R. 152); it was true with respect to the tow boats and barges by and in which the coal was moved down the river (R. 145, 152, 156-157, 168-169); it was true with respect to Risher Harbor (R. 147, 152, 163); it was true with respect to the dock and the river to rail transfer facilities at Smith's Ferry (R. 145-146, 152-153); it was true also with respect to the private track from Smith's Ferry to Negley and the equipment operating on the same (R. 145, 153, 156, 169, 172).

That the track from Smith's Ferry to Negley and the locomotives and cars operating on the same were the private property of the coal company; and that the operation thereon was the private operation of the coal company, was also found, as a matter of law to be the true situation in the opinion, the decree, and the findings of fact and conclusions of law of District Judge West in Equity Proceeding No. 4533, in the Northern District of Ohio, Eastern Division. (R. 151-154, 209-211, 212-217)

There was no through and continuous transportation from the mine to Negley and no maintenance of any original package in the cars or the movement from the mine to Negley. (R. 151, 169)

When the raw run of mine coal finally arrived at the Negley plant, it was put through the process of washing, cleaning, sizing and preparing with considerable loss of volume of the original coal and considerable change in the chemical and physical character of the coal. (R. 145-146, 149, 153-157, 158-159, 162-170) There was no intention at any time to sell the raw run-of-mine coal to any consumer; there was no dealing by the Pittsburgh Coal Company in the raw run-of-mine coal; and the only sale by the Pittsburgh Coal Company was of the prepared coal. (R. 149, 150, 151, 153-154, 158, 167)

The prepared coal was sold to the purchasers in Youngstown out of the Negley plant and could not have been sold out of the mine or any place other than the Negley plant, because the facilities for preparing the coal in the particular manner required by the purchasers were not available at any point other than the Negley plant. (R. 147, 149, 150-151, 153-154, 162)

None of this evidence was in any wise controverted; on the contrary, it was admitted by the appellants to show the true situation. It amply supports the finding that there was no dealing in, or with respect to the coals in the course of the movement from the mine to Negley; the finding that there was no through and continuous transportation of the coal from the mine to Negley; and the further finding that there was no commerce whatever in the coal in the course of that movement from the mine to Negley.

The District Court, therefore, did not err in its conclusion that "there is substantial evidence supporting the finding of the Public Utilities Commission of Ohio" on these particular points.

II. COMMON CARRIER TRANSPORTATION OF A PREPARED PRODUCT WHICH IS WHOLLY INTRASTATE IN *LOCUS* DOES NOT BECOME INTERSTATE IN CHARACTER MERELY BECAUSE THE RAW COMMODITY FROM WHICH THE PREPARED PRODUCT WAS PROCESSED HAD PREVIOUSLY BEEN MOVED FROM ANOTHER STATE BY NON-COMMON CARRIER FACILITIES WITH AN INTENT TO MARKET THE PREPARED PRODUCT IN THE SECOND STATE.

(This has reference to Appellants' Assignments of Error, 4, 5, and 6)

III. THE ORDER OF THE OHIO COMMISSION WAS A LAWFUL AND PROPER REGULATION OF OHIO STATE COMMERCE.

(This has reference to Appellants' Assignment of Error 2)

As has already been shown, the Ohio Commission upon substantial evidence, found, and the specially constituted district court affirmed, that there was no transportation, dealing or commerce incident to the movement of coal from the mine to Negley. That movement was the sole and private affair of the Pittsburgh Coal Company. It was not until the coal was prepared by the coal company in its Negley plant,—the only place where it could have been so prepared to meet the requirements of the purchasers,—and was then shipped by the coal company via the Lisbon and its connecting lines to those purchasers, that dealings with respect to the coal were had, first, between the coal company and the purchasers, and then between the coal company and the common carrier railroads.

It was precisely such a state of facts, showing a non-common carrier and wholly private movement into a state and a subsequent movement via a common carrier wholly

within that state, that drew from the Circuit Court of Appeals in *Chicago, M. St. P. & P. R. Co.* v. *Campbell River Mills Co.*, 53 F. (2d) 69, 73; *certiorari* denied, 285 U. S. 536; the comment equally pertinent here, that,—

> "The appellant cites no case in which a state commission has been found without power to regulate rates on intrastate shipments of goods brought into the state by agencies other than common carriers."

This view of the Circuit Court of Appeals is the logical, and indeed, the inevitable result of the fact that the interstate commerce act provides only for the regulation of common carriers and their transportation in interstate commerce.[1] This long-established policy of the Congress as respects railroads, has recently been extended to the public highways by the Motor Carrier Act, 1935,[2] which carefully distinguishes between the various motor vehicle carriers,—common, contract and private,—in the scheme of regulation therein provided. It should also be noted that in both the State of Ohio[3] and the Commonwealth of Pennsylvania,[4] wherein the Smith's Ferry-Negley private track of the Pittsburgh Coal Company lies, such private tracks are exempt as non-common carrier properties from regulation by the state commissions.

We do not overlook the fact that the Circuit Court of Appeals in the *Campbell River Mills case, supra,* went on to show that there are decisions holding that "goods brought into a state by private carriers, though transported by common carriers between points wholly within the state, nevertheless were articles of interstate commerce." It cites such cases with the explanation that "they did not involve either the making or enforcing of freight rates and are not controlling in such cases." The truth is that most

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[1] Interstate Commerce Act, Part I, Section 1 (1) (3).
[2] Interstate Commerce Act, Part II, Section 203 (14)-(17).
[3] Ohio General Code, Section 503.
[4] Pennsylvania Public Service Company Law, No. 854, Article 1, Section 1.

of the cases of the character so referred to by the Circuit Court of Appeals are tax cases and as such are subject to the rule which this court has long recognized—see *Baltic Min. Co.* v. *Massachusetts*, 231 U. S. 68, 85, that,—

> "Every case involving the validity of a tax must be decided upon its own facts."

We proceed, therefore, to an analysis of the cases which, for the most part, do "involve either the making or the enforcing of freight rates," and which are factually wholly, or largely on all fours with the instant case. For, despite the assertion of appellants to the contrary, in their Statement as to Jurisdiction (Page 4), there are many such cases, not only in the decisions of this court, but in the decisions of the subordinate federal courts, and of the Interstate Commerce Commission and The Public Utilities Commission of Ohio.

The line of decisions by this court which are most specifically here in point commences with the *Grant Brothers case, Santa Fe, P. & P. R. Co.* v. *Grant Bros. Constr. Co.*, 228 U. S. 177. The question there went to the right of a common carrier railroad to transport at contract rates less than the standard published rates for common carrier transportation, property of a construction company used in connection with the construction of the railroad's common carrier facilities.

After discussing at some length the legal obligations of common carriers, the court said,—

> "For these reasons, the common carrier, in the prosecution of its business as such, is not permitted to drop its character and transmute itself by contract into a mere bailee, with right to stipulate against the consequences of its negligence.
>
> Manifestly, this rule has no application when a railroad company is acting outside the performance of its duty as a common carrier." (p. 185) * * *
>
> * * * * * * * * * *

"In constructing, improving, or repairing its road, and in building its extensions and branches, the railroad company is providing facilities for its service as a common carrier, but, of course, is not acting as such." (p. 186) * * *

"It is clear that in dealing with transportation of this character over its own road, in connection with construction or improvement, a railroad company is not acting in performance of its duty as a common carrier, and the arrangement for free or reduced-rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith, and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions. See *Re Railroad-Telegraph Cos.*, 12 Inters. Com. Rep. 10, 11." (p. 188)

The substance of the court's decision in the *Grant Bros. case* was that a common carrier, engaged in the transportation of its own property, was not in such transportation acting as a common carrier. Obviously, this is all the more so with respect to a private corporation moving its own property, which was the position of the Pittsburgh Coal Company here in the movement of its own coal from its own mine via its own river and rail facilities to its own processing plant at Negley.

Next, in the decisions of this court, we find the *Pipe Line cases, United States* v. *Ohio Oil Co.*, 234 U. S. 546. There the Interstate Commerce Commission, pursuant to then recent amendments to the interstate commerce act, had entered an order requiring the appellant pipe line companies to file with the Commission their schedules of rates and charges for the transportation of oil. That order was under review by this court in that proceeding. The order was upheld with respect to all of the pipe lines except that of the Uncle Sam Oil Company. Concerning it, the majority opinion of the court said (pp. 561-562):

"There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line, to its own refinery, for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end."

Chief Justice White, in his concurring opinion, used this language to describe the particular situation of the Uncle Sam Oil Company (pp. 562-563):

"That company owns wells in one state from which it has pipe lines to its refinery in another state, and pumps its own oil through such pipe lines to its refinery; and the product, of course, when reduced at the refinery, passes into the markets of consumption. * * *"

"It is shown beyond question that the company buys no oil, and by the methods which have been mentioned simply carries its own product to its own refinery; in other words, it is engaged in a purely private business. Under these conditions, in my opinion there is no power under the Constitution without the exercise of eminent domain to convert without its consent the private business of the company into a public one."

This decision is authority for the proposition that a private corporation, engaged in the movement of its own oil from its own wells via its own pipe line facilities to its own refinery, although such movement is across state lines, is not engaged in transportation, let alone commerce, and is not subject to regulation under the interstate commerce act. This was the unanimous conclusion of the court, for

the judgment as to the Uncle Sam Oil Company was concurred in by Mr. Justice McKenna, who dissented otherwise.

The position of the Pittsburgh Coal Company incident to the transportation of its coal from the mines in Pennsylvania to the preparation plan. in Ohio, is exactly that of the Uncle Sam Oil Company, for the movement was of its own coal via its own private facilities to its own plant in the second state for processing or refining in that plant, analogous to the oil refinery.

We next refer to the *McCluskey case, McCluskey* v. *Marysville & N. R. Co.*, 242 U. S. 36, which arose under the Employers' Liability act. The gist of this decision is found in the following paragraph quoted by this court from the opinion of the Circuit Court of Appeals:

> "In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tidewater, where they were sold, was not a shipment. There was no contract of carriage; there was no bill of lading; there was no consignor or consignee. The goods were not committed to a carrier. The defendant Mill Company simply carried over its own road, on its own cars, its own goods to a market where it sold and delivered them. It had no concern with the subsequent disposition of them. It was under no obligation to deliver them to another carrier, and no other carrier was under obligation to receive them or carry them further. The selling of the poles after the first sale by the Mill Company, or whether they were going outside of the state, depended upon chance or the exigencies of trade. The movement of the poles did not become interstate commerce until, by the act of the purchasers thereof, the poles were started on their way to their destination in another state or country. The beginning of the transit which constitutes interstate commerce 'is defined in Coe v. Errol to be the point of time that an article is committed to a carrier for transportation to the state of its destination, or started on its ultimate passage.' " (pp. 39-40)

This, again, is a case specifically in point. The Marysville & Northern Railway Company was nothing but the private logging track and the mere asset of the Stimson Mill Company. The logging track and the equipment operated over it, were analogous in every way to the private facilities of the Pittsburgh Coal Company via which the coal was moved from the mine in Pennsylvania to the processing plant in Ohio. The decision by this court was again unanimous.

Next we refer to the *Florida Oil case, Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U. S. 257. This is another case where, upon the decision by this court depended whether the lower intrastate Florida rates or the higher interstate rates applied on certain all-rail shipments of petroleum products wholly within the State of Florida.

The petroleum products in question reached Florida by tank steamers arriving at Port Tampa and Jacksonville. The tank steamers were owned and chartered by the sellers of the oil and moved originally from Baton Rouge, La., and Tampico, Mexico, and so far as these sellers were concerned, the ultimate delivery points of the petroleum products were Port Tampa and Jacksonville.

In some cases the petroleum products were pumped from the ship's tanks into storage tanks at the ports of entry and from the storage tanks were pumped into tank cars for the movement on the railroads. Among other facts developed were that at times the tank cars were being loaded out of the storage tanks at the ports while the storage tanks were simultaneously being filled with oil from the ocean vessels. In other instances, particularly as respects lubricating oils, the tank cars were loaded directly from the tank steamers, there being no intermediate storage at the ports. It was under these circumstances that there arose the question whether the subsequent rail transportation wholly within the state of Florida was interstate commerce and should pay the relatively higher interstate rates, or was

Florida intrastate commerce and should pay the relatively lower intrastate rates.

In determining that the commerce within Florida was in every instance intrastate in character, Chief Justice Taft spoke as follows for a unanimous court:

> "It seems very clear to us on a broad view of the facts that the interstate or foreign commerce in all this oil ends upon its delivery to the plaintiff into the storage tanks or the storage tank cars at the seaboard, and that from there its distribution to storage tanks, tank cars, bulk stations and drive-in stations, or directly by tank wagons to customers, is all intrastate commerce. This distribution is the whole business of the plaintiff in Florida. There is no destination intended and arranged for with the ship carriers in Florida at any point beyond the deliveries from the vessels to the storage tanks or tank cars of the plaintiff. There is no designation of any particular oil for any particular place within Florida beyond the storage receptacles or storage tank cars into which the oil is first delivered by the ships. The title to the oil in bulk passes to the plaintiff as it is thus delivered. When the oil reaches these storage places along the Florida seaboard, it is within the control and ownership of the plaintiff for use for its particular purposes in Florida. The plaintiff is free to distribute the oil according to the demands of its business, and it arranges its storage capacity to meet the future variation in its business needs at Tampa, Port Tampa, or Jacksonville, or St. Johns river terminal." (pp. 267-268)
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> * * * * * * * * * *
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> "We have no hesitation in saying that the nature of the commerce in controversy in this case was intrastate." (p. 270)

It was obvious in this *Florida oil case* that the oil was not to be consumed merely at Port Tampa and at Jacksonville; it was clear from the outset that it would be distributed from those points to over one hundred different distributing places in the state. The case in that respect

is analogous to the case at bar, where it is also clear that the coal is not for consumption at Negley, the location of the processing plant, but at numerous points beyond Negley in the state of Ohio and even beyond.

The case is also analogous to that at bar because the transportation into the state was by private facilities of the producers of the oil at Baton Rouge and Tampico. Here the movement into the state of Ohio is by the private facilities of the producer of the coal at the Pennsylvania mines.

We come next to the *Campbell River Mills case,* decided in the District Court in *Campbell River Mills* v. *Chicago, M. St. P. & P. R. Co.,* 42 F. (2d) 775; in the Circuit Court of Appeals in *Chicago, M. St. P. & P. R. Co.* v. *Campbell River Mills Co.,* 53 F. (2d) 69; and wherein *certiorari* was denied by this court in S. 536.

This was another case wherein, upon the determination of whether the transportation in question was interstate or state commerce, depended whether the relatively lower state rates or the relatively higher interstate rates should apply on certain shipments of logs. The Mills Company owned growing timber located in one tract partially in the state of Washington and partially in British Columbia. In that timber it cut its own logs indiscriminately, and transported the same by its own private track Columbia Valley, to a point of shipment on the Milwaukee Road in the state of Washington. It is worthy of notice that this transportation of the logs, although over the private railroad of the Mills Company, was on log trucks furnished by the Milwaukee Road, that is, a part of the Milwaukee Road's common carrier equipment. Upon arrival of the loaded log trucks at Columbia Valley, the Mills Company there gave shipping instructions to the Milwaukee Road covering the movement of the loaded trucks of logs to Bellingham, Washington, via a wholly intrastate Washington route. At Bellingham the logs were unloaded, in part consumed local-

ly, and in part rafted by water to a destination in British Columbia.

On these facts the Mills Company contended that for the all-rail common carrier haul wholly in the state of Washington, freight charges should be assessed at the relatively lower intrastate Washington rates, whereas the Milwaukee road claimed that they should be assessed at the relatively higher interstate rates.

Both the District Court and the Circuit Court of Appeals were of the opinion that the commerce was intrastate Washington commerce; both courts commented upon the fact that the Interstate Commerce Commission had tentatively reported that it had no jurisdiction in the premises. (42 F. (2d) 775, 776; 53 F. (2d) 69, 70). The proceeding before the Commission, it may be noted, was under its Docket No. 18,298, *Campbell River Mills, Ltd.*, v. *Chicago, Milwaukee & St. Paul Ry. Co.*, and the dismissal of the complaint was without formal report by the Commission.

The District Court said:

> "The Interstate Commerce Act, as amended Acts of Cong. June 29, 1906 (34 Stat. 584), April 13, 1908 (35 Stat. 60); June 18, 1910 (36 Stat. 539), May 29, 1917 (40 Stat. 101), August 10, 1917 (40 Stat. 272), and February 28, 1920 (41 Stat. 456) applies to common carriers engaged in transportation of property under a common control for continuous shipment, but does not apply to goods of foreign origin but not *shipped* from a foreign country.
>
> 'Shipment' is the act of dispatching or delivery on board of the carrier. Fisher v. Minot, 76 Mass. (10 Gray) 260; Ledon v. Havemeyer, 121 N. Y. 179, 24 N. E. 297, 8 L. R. A. 245; Schmertz v. Dwyer, 53 Pa. 335; State v. Carson, 147 Iowa, 561, 126 N. W. 698, 140 Am. St. Rep. 330. A common carrier is one who undertakes to transport for hire from one place to another goods for such as employ him. Bay v. Merrill & Ring Lbr. Co. (D. C.) 211 F. 717, 720. A concern is not a common carrier carrying only its own products. Bay v. Merrill & Ring Lbr. Co. *supra*. See, also, Nordgard v. Marys-

ville & N. R. Co. (D. C.) 211 F. 721, affirmed (C. C. A.) 218 F. 737; Id., 243 U. S. 36, 37 S. Ct. 374, 61 L. Ed., 578.

The logs in issue had not entered commerce until committed for *shipment*. Commerce is a practical legal conception drawn from the course of business. Savage v. Jones, etc., 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182. There is a distinction between interstate commerce and interstate transportation. One is governed by the nature of the business; the other by the nature of the particular transportation. 'Commerce' is within inhibitions of the Sherman Act (15 USCA, Sections 1-7, 15), but 'transportation' may have no relation to interstate rates on shipment of the same goods within the same state. Atl. Coast Line R. Co. v. Standard Oil (C. C. A.) 12 F. (2d) 541, 547, 60 A. L. R. 1456; Atl. C. L. R. Co. v R. R. Com. of Georgia (D. C.) 281 F. 321, See, also C., M. & St. P. R. R. Co. v. Iowa, 233 U. S. 334, 34 S. Ct. 592, 58 L. Ed. 988; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 27 S. Ct. 360, 51 L. Ed. 540." (pp. 777-778)

It was on the appeal from the decree of the District Court holding that the commerce in question was intrastate, that the Judges of the Ninth Circuit commented, as already said, that "the appellant cites no case in which a state commission has been found without power to regulate rates on intrastate shipments of goods brought into the state by agencies other than common carriers." (p. 73)

This is another case on all fours with the case at bar. Indeed, it is fair to say that the case at bar is even more clearly demonstrated by the facts to be a case of purely intrastate commerce, for, in the *Campbell River Mills case,* although the movement of the logs was on the private log road, it was in common carrier facilities of transportation, whereas, in the instant case the entire movement, river and rail, from the mines to Negley was in and by the solely private facilities of the Pittsburgh Coal Company.

Of the reports of the Interstate Commerce Commission, we refer first to *Railroad-Telegraph Contracts,* 12 I. C. C. 10. In that proceeding the Commission interpreted an ad-

ministrative ruling, previously issued, and reading in part, as follows (p. 11):

> "Nor does the Commission construe the law as preventing a carrier from giving free or reduced-rate carriage over its line to contractors for material, supplies, and men for use in construction, improvement, or renewal work on the line of that carrier, provided such arrangements for free or reduced-rate carriage are made a part of the specifications upon which the contract is based and of the contract itself."

The Commission's conclusion was as follows (p. 12):

> "After a careful consideration of the oral arguments of counsel and of the briefs submitted to us in support of these petitions, the Commission is of the opinion that the rulings above set forth are in exact conformity with the terms and spirit of the law. Contracts between telegraph companies and carriers for the maintenance of telegraph lines on the rights of way of railroads are *sui generis* and unlike any other contracts with carriers that have come to our attention."

Thus it will be seen that the Commission recognized that the railroad in transporting construction materials, not directly for itself but for its contractors, was not acting as a common carrier. In other words, the Commission so early as 1906 recognized that a common carrier engaged in the transportation of its own property over its own common carrier line, was not acting in a common carrier capacity. Again we say that rule is surely applicable to the movement by a private corporation of its own goods.

A decision by the Interstate Commerce Commission practically on all fours with the *Florida Oil case, supra,* is *United States Finishing Co.* v. *N. Y., N. H. & H. R. R. Co.*, 142 I. C. C. 331. There the Commission considered the question of tank car shipments of fuel oil from East Providence, R. I., a port of entry, via a wholly Rhode Island route, to Saylesville, R. I. The Commission's report shows (see p. 331) that the oil originated in Texas, and was transported

by the Gulf Refining Company by rail or pipe line to Port Arthur, Tex., thence in chartered vessels to East Providence, where it was unloaded direct into that company's storage tanks. There the oil remained in the possession and exclusive control of the Gulf Refining Company as a part of its stock to be subsequently distributed to complainant and others according to commercial needs. Complainant contracts with the Gulf Refining Company for its yearly supply of oil at a specified price f. o. b. East Providence. Shipments were drawn from that company's general storage supply and handled in the usual manner. Commenting upon similarity to the *Florida Oil case, supra,* the Commission said that,—

> "Upon this record we find that the shipments were intrastate. The complaint will be dismissed for lack of jurisdiction." (p. 333)

M. D. Friedman Co. v. *C. & O. Ry. Co.*, 194 I. C. C. 455, is another decision of the Interstate Commerce Commission, involving the transportation by a common carrier railroad of its own property. It is of principal interest for two reasons, first, the transportation was joint, being partly over the line of the carrier which owned the property, and partly over a connecting line which had no ownership in the property; second, the decision of the Commission is rested squarely upon the decisions in the *Grant Bros. case, supra,* and in the *Campbell River Mills case, supra.*

The facts show that the Southern Railway gathered up scrap iron along its line in the State of Indiana, loaded the same into cars, and moved the cars on its own rails to Lexington, Ky., at which point the Southern connected with the Chesapeake & Ohio Railway. The movement from the Indiana points where the scrap was loaded, to Lexington, was on a type of billing which, on its face suggested a shipper-carrier or common-carrier relationship. Upon arrival of the cars at Lexington, they were transferred to the Chesapeake & Ohio

and by it transported from Lexington to Ashland and there delivered to the consignee. The specific question was the character of the transportation via the Chesapeake & Ohio from Lexington, Ky., to Ashland, Ky., a wholly Kentucky route.

The Commission held that that transportation was intrastate Kentucky commerce, and spoke as follows:

> "But such billing, even though made out on a bill-of-lading form, nevertheless was neither in fact nor in law a bill-of-lading contract, so far as the transportation up to Lexington was concerned. This is true because a transportation contract, like any other contract, necessitates two parties, a shipper and a carrier for hire. For the transportation up to Lexington there was but one party, the Southern. That company was merely moving its own scrap material, in its own equipment, and over its own rails to Lexington. It was not doing this for hire. No party other than the Southern had any rights or duties whatever in connection with that transportation. Hence up to Lexington the above billing memorandum was not in any sense a transportation contract, and any implication of a shipper-carrier relation based thereon is misleading and wholly unwarranted." (p. 456)
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> "Even though the common-carrier transportation occurred within a single State, do the facts of noninterruption of movement and non-breaking of bulk at Lexington in any way alter the jurisdictional situation? In this connection it is apparent that when a railroad corporation sells its discarded company material, which it lawfully may do, the sales contract has no different legal aspects than any other ordinary selling transaction; and the Southern, under the facts of record, was free to move the property to Lexington in any manner it saw fit. It happened to select its own railroad facilities. Those instrumentalities, under usual conditions, are impressed with the attributes of common carriage, but it was held by the Supreme Court in *Santa Fe, P. & P. Ry. Co.* v. *Grant Bros.*, 228 U. S. 177, that when a railroad company transports its own property it acts not as a common carrier but as a private carrier.

> Hence, the use in this instance of railroad instrumentalities up to Lexington did not impress upon that traffic anything to change the private character of the transportation. In legal contemplation the situation would have been no different had the scrap material been moved up to Lexington by private highway truck." (p. 457)
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> "Upon further hearing, we reverse the prior finding of division 5 and now find, inasmuch as the transportation from Lexington to Ashland was unconnected with any interstate common-carrier transportation, that it is not within our jurisdiction." (p. 458)

Here, again, we say that if, as repeatedly found by the courts, and as found by the Commission in the *Friedman case,* the transportation by a common carrier of its own property is not common carrier transportation, then most certainly the movement by the Pittsburgh Coal Company, a non-common carrier corporation, of its own property over its private facilities, does not in any wise attach to the subsequent common carrier transportation from Negley to Youngstown and make of the latter interstate commerce.

A very recent decision of the Interstate Commerce Commission, simple in its facts, constitutes a very strong indication of the folly of the theory which the appellants maintain should be here applied. We refer to *Crowley* v. *Atchison, T. & S. F. Ry. Co.,* 206 I. C. C. 221. There the common carrier rail transportation involved was carloads of horses from Calexico and National City, Calif., via wholly California routes to California destinations. Nevertheless the rail carriers insisted that because the horses had originally been located in Mexico, and had been driven over the road across the international boundary to the points of rail shipment involved, that the subsequent common carrier transportation, wholly in California, was interstate in character. This contention the Commission set aside, after a discussion of the *Campbell River Mills case,* with the statement that "we are of opinion that the transportation was not

such transportation as is subject to the interstate commerce act." (p. 223)

We also refer the court to the decision of the Public Utilities Commission of Ohio, *National Mortar and Supply Co.* v. *The Pennsylvania Railroad Company, et al.,* Ohio P. U. C. Reports, 1929, page 79. It is not necessary to recite the facts and reference is made to the decision merely to indicate that the facts permitted the Ohio Commission to determine the issue upon the basis of the rule laid down by this Court in the *Florida Oil case, supra.* That Commission was likewise consistent in this proceeding.

We respectfully submit that all of these decisions,—and the decisions in this Court were invariably unanimous, fully support the proposition that this commerce in bituminous coal from Negley to Youngstown is wholly within the purview of the Public Utilities Commission of Ohio, and that that Commission's action with respect thereto was a lawful and proper regulation of Ohio intrastate commerce.

IV. THE ORDER OF THE OHIO COMMISSION, INSOFAR AS IT REQUIRES THE APPELLANTS IN THE FUTURE TO TRANSPORT, SWITCH AND DELIVER AS OHIO STATE COMMERCE, OTHER CARLOADS OF BITUMINOUS COAL TRANSPORTED INTO YOUNGSTOWN UNDER CIRCUMSTANCES AND CONDITIONS LIKE THOSE SURROUNDING THE TRANSPORTATION OF THE FOUR CARLOADS HEREIN DIRECTLY INVOLVED, IS NOT UNLAWFUL BECAUSE VAGUE AND UNCERTAIN.

(This has reference to Appellants' Assignment of Error 7.)

All of the Youngstown railway lines other than the complainant Youngstown and Suburban Railway were before the Ohio Commission as defendants. Only the Pennsylvania and the Erie, however, were there as named defen-

dants. (R. 71) The others were voluntarily there as intervening defendants. (R. 82) However, the order of the Ohio Commission which is here in issue runs only against the Pennsylvania and the Erie, the only trunk-lines concerned in this particular transportation of these four cars from Negley to Youngstown. (R. 41-42)

It is, however, interesting to observe that while the other trunk lines intervened before the Commission as defendants, they then quibbled quite a bit respecting the effect, as to them, of any order that the Commission might enter. (R. 82, *et seq.*) But they finally agreed that "if the order was a valid one • • • and imposed certain obligations on these defendants, then certainly the same regulations, the same law, would ordinarily apply to the interveners." (R. 83) Apparently in their Assignment of Error No. 7 (R. 222), and in their point 4 (R. 230) all of the trunk lines now seek to escape the obligation of that order, at least temporarily, by possible future litigation, should their appeal to this Court fail. In other words, they threaten recourse to a multiplicity of suits on each and every car as the same may be hereafter shipped from Negley, so as to hinder, harass and delay this Ohio intrastate commerce.

That portion of the Ohio Commission's order to which Assignment of Error No. 7 and Point 4 takes particular exception, requires that the Pennsylvania and Erie abstain from failing, etc., to switch and deliver "any other carloads of bituminous coal, at the Ohio intrastate rates or charges applicable for the switching of such traffic in Youngstown and contemporaneously in effect, that may be shipped from Negley, Ohio, and roadhauled into Youngstown by the Youngstown and Suburban Railway for delivery to consignees with private sidings on the line of the Erie Railroad in the city of Youngstown, under similar circumstances and conditions with respect to the four carloads of bituminous coal, herein directly involved as described in said report." (R. 42)

This particular requirement was not unthinkingly laid upon the Pennsylvania and the Erie. It was in direct response to the prayer of the complainant before the Commission for an order which would require the defendants not only to switch the four cars of coal directly involved, but also "any other carloads of bituminous coal likewise loaded, shipped, and billed from the point of physical connection of complainant and defendant The Pennsylvania Railroad Company in said Youngstown, via the connecting routes of said defendants in said Youngstown, to consignees located on the line of defendant Erie Railroad Company in said Youngstown." (R. 79)

There was good reason for inclusion of this particular prayer in the complaint. At that particular time things were happening in Youngstown, and threats as to what might happen were numerous. Under the circumstances, there was a well grounded understanding on complainant's part that an order of the Commission which, applying alone to the four cars directly in issue, might, if favorable to the complainant, merely give rise to further litigation with respect to other cars that might subsequently be shipped in the same manner. Upon the hearing before the Commission it developed that after the Pennsylvania had declined to receive and forward these four cars to the Erie, the Erie had advised the Y. & S. that if the four cars were in fact delivered to it by the Pennsylvania it (the Erie) would in turn refuse to switch the same at the Ohio intrastate rates to consignees on its line. (R. 118)

There is no question whatever here with respect to the common carrier transportation from Negley to Youngstown except as to its state or interstate character. The determination of that question depends solely upon what occurred in the course of the movement of the coal from the mine to Negley. Once the only question of law involved here is settled, the question of the character of the commerce from Negley to Youngstown is likewise settled, not

merely as to these four cars, but as to cars that may similarly be shipped in the future. No good reason appears, therefore, why the order, if it is sound in law, should not apply to the future transportation of other cars of bituminous coal likewise and under similar circumstances, shipped by the Pittsburgh Coal Company from its processing plant at Negley.

We therefore submit that the order of the Commission is not unlawful because of vagueness or uncertainty on account of its application to future instances of transportation handled under circumstances and conditions similar to those surrounding the transportation of the four cars in question here.

V. THE DISTRICT COURT DID NOT ERR IN DECREEING THAT THE BILL OF COMPLAINT SHOULD BE DISMISSED AT COMPLAINANTS' COSTS.

(This has reference to Appellants' Assignment of Error 3.)

On the strength of the arguments already advanced, we submit that the District Court committed no error in decreeing that the appellants' bill of complaint should be dismissed.

We also submit that there was no error on the court's part in providing that the trial should be at complainants' costs. Certainly on the *locus* of the transactions the only common carrier transportation here involved was wholly within the State of Ohio. The situation was one peculiarly within the rule long ago laid down by this court in *New York ex rel. Pennsylvania R. Co.* v. *Knight,* 192 U. S. 21, that,—

> "when service is wholly within a state, it is presumably subject to state control. The burden is on him who asserts that, though actually within, it is legally without the state; and unless the interstate char-

acter is established, locality determines the question of jurisdiction, *Coe* v. *Errol,* 116 U. S. 517, 29 L. Ed. 716, 6 Sup. Ct. Rep. 475, though not in all respects similar is very closely in point."

On the basis of this rule the trunk lines went beyond all color of legal right when they insisted upon prepayment of the switching at the interstate rates, especially at such ridiculous interstate rates as apply on this particular traffic. The Youngstown & Suburban was entitled to rely upon the presumption that the transportation of these particular four cars, being from a point where the Lisbon, the originating line, had no common carrier connection, and wholly within the State of Ohio, was Ohio intrastate commerce, and subject only to Ohio intrastate rates and charges. Furthermore, such a procedure would have constituted ample protection for the trunk lines in the event of a final determination that the interstate rates should have been paid. For under the Interstate Commerce Act transportation in interstate commerce must be paid for at the rates lawfully on file with the Interstate Commerce Commission and applicable thereto.

Under such circumstances we respectfully submit that all the costs of the litigation should be assessed against the trunk line appellants, inasmuch as it was on account of their failure to transport Ohio intrastate commerce at Ohio intrastate rates that the litigation became necessary.

Reply to Appellants' Opening Brief.

The appellants' opening brief deals with a great many subjects not essential to a correct understanding of the case or to a determination of the issues involved. Particularly it deals at great length and makes many charges respecting certain intercorporate relationships between the Y. & S., which was the complainant before the Ohio Commission, the Lisbon, and the Pittsburgh Coal Company.

This attitude comes distinctly as a matter of surprise, and we may say of amazement, to the appellees, for it constitutes an absolute about-face on the part of the appellants. This is very definitely shown by the proceedings before the Ohio Commission at R. 120-121. At that time objection was made by the complainant to queries directed to these intercorporate relationships, and the following colloquy occurred:

> "Mr. Gutheim: All I want to say is that we have spent a year going all through this same proposition in the Eastern District Court in Ohio, Federal Court, and all I am trying to avoid here is that we try again all of the points with respect to the ownership by the Pittsburgh Coal Company of the stock of these companies. There is nothing unlawful in that ownership.
>
> Mr. Orcutt: I didn't impute anything unlawful.
>
> Commissioner Schaber: I don't think it is offered with the intent of showing any unlawful relationship.
>
> Mr. Orcutt: Not at all, Sir, and this was my only question. I don't intend to try that whole case."

With that disavowal, the appellants abandoned that line of inquiry in the hearing before the Ohio Commission. They subsequently filed with the Commission the Findings of Fact and Conclusions of Law by Judge West in the injunction proceedings commenced by the trunk lines in the Northern District of Ohio, Eastern Division (R. 212-217) respecting the private track of the Pittsburgh Coal Company. Clearly those findings and conclusions, filed, as they actually were, as a part of and explanatory of Judge West's opinion, constitute no evidence in this proceeding; they merely explain Judge West's opinion (R. 209-211) in that proceeding. In submitting the matter to the Commission upon brief appellants referred to the control of the Lisbon and the Y. & S. by the Pittsburgh Coal Company, but made no contention and advanced no argument that the same were in any respect unlawful. The Commission, in its report, refers to the injunction proceeding in the Northern District

of Ohio, Eastern Division, to show that the opinion and findings of District Judge West demonstrated, as did the evidence in this proceeding, that the track from Smith's Ferry to Negley was the purely private enterprise of the Pittsburgh Coal Company. (R. 14, 17-19)

Appellants' petition below recited the control of the Lisbon and the Y. & S. by the Pittsburgh Coal Company (R. 3), but none of the ten paragraphs therein which aver unlawfulness in the Commission's order, in any way attacked those relationships. (R. 5-7) Likewise appellants' brief below merely referred to the control by the Coal Company of the two short lines, but made no point thereof save in one paragraph, as follows:

> "It should be borne in mind that the whole scheme of the Pittsburgh Coal Company in acquiring control of the Suburban and the Lisbon through stock ownership, the construction of the railway from Smiths Ferry to Brush Run and the cleaning plant at Brush Run, together with the connection with the Lisbon near Negley, Ohio, was a plan to market coal mined in Pennsylvania in northern Ohio chiefly at Youngstown." (p. 6)

Certainly that paragraph charged nothing unlawful.

Under such circumstances it is hardly to be wondered at that the District Court, in its decree, findings, and conclusions (R. 69-70) does not mention the intercorporate relationships. But the important thing to observe is that none of the appellants' seven assignments of error filed here (R. 221-222) mentions those intercorporate relationships; nor is there in any one of the six points upon which appellants chose to rely in this Court (R. 229-231) the charges of unlawfulness in those relationships which are now so vehemently argued.

The Ohio Commission in considering the complaint of the Y. & S., found it necessary to determine but one question, and that was whether or not this particular traffic from Negley to Youngstown was intrastate or interstate com-

merce. It had no concern with the private litigation or litigations between the appellants and any other parties. It had no concern with the intercorporate relationships and especially so because the appellants informed the Commission, as just shown, that they imputed nothing unlawful to those intercorporate relationships. Under the circumstances we deem it unnecessary for the Ohio Commission here to deal with that subject, and, indeed, it is not necessary for this Court to consider it.

However, we point out to the Court that the appellants' very extensive discussion of the, "Pittsburgh Coal Company," the "Intercorporate Relations," and the "Immediately Pertinent Facts," contains numerous statements and innuendoes not supported by record reference. For this reason, and because their discussion goes far beyond the facts testified to before this Commission, we cannot agree that "there is no controversy" as to the facts appellants recite.

Appellants' opening brief was long delayed in filing and serving, and therefore we shall separately answer *seriatim* the opening statements and the arguments of the appellants to the extent deemed necessary in the interest of accuracy.

Reply to appellant's opening statements.

In the court below District Judge Hough, now deceased, did not merely participate in the conference at which the case was decided. He "joined in the conclusion upon which the foregoing order is based." (R. 70)

Findings of Fact and Conclusions of Law.—The decree below does not, to be sure, formally state, under those headings, Findings of Fact and Conclusions of Law. But the necessary findings and conclusions are incorporated in the decree as follows:

> "The Court * * * is of the opinion that there is substantial evidence supporting the finding of the Public Utilities Commission of Ohio * * *." (R. 69-70)

> "The order complained of in the bill, since the interstate transportation covered by the record was carried on wholly by private carrier, and since the transportation by common carrier was wholly within the State of Ohio, is lawful and proper (Santa Fe, Prescott and Phoenix Ry. Co. v. Grant Bros. Construction Co., 228 U. S. 177; The Pipe Line Cases, 234 U. S. 548, 562; Atlantic Coast Line Rd. Co. v. Standard Oil Co. of Kentucky, 275 U. S. 257), and the prayer of complainants' bill should be denied." (R. 70)

These are the only findings and conclusions which were necessary for the support of the Ohio Commission's order, and it will be observed that the Assignments of Error filed by the appellants in this Court are addressed to the particular finding of fact and the particular conclusion of law so announced by the court below.

Rates from Pennsylvania Mines to Ohio Destinations.—None of the rates published for the transportation of coal from Pennsylvania mines to Ohio destinations apply over the particular water-and-rail route via which the coal here in question moved. There are no rates published and filed for the transportation of coal via those routes. The Interstate Commerce Commission has never undertaken to require that tariffs naming such rates be filed with it, required under Section 6 (1) of the Interstate Commerce Act, Obviously this is because that Commission well knows that none of this movement from the mines to Negley, Ohio, is common carrier transportation.

The Statute.—Appellants' quotation from Section 1 (3) of the Interstate Commerce Act improperly omits the very pertinent sentence reading, "Wherever the word 'carrier' is used in this act it shall be held to mean 'common carrier'."

The Switching Rates in Youngstown.—We have already referred, *ante*, pp. 4-5, to the fact that considered as intrastate Ohio commerce, these trunk lines charge for their switching service from the Y. & S. Railway to the con-

signee on the Erie Railroad, $7.65 per car; whereas, if the traffic be considered as interstate, as the trunk lines here contend, their charge for the identical service is $94.50 per car.

It is interesting, in view of the fact that the trunk lines now merely say that the interstate switching rates here involved "are materially higher" than the intrastate switching rates, to note just how that situation was developed in the proceedings before the Commission. There, counsel for the trunk lines, after a colloquy on the subject, stated:

> "We will show affirmatively later on that there are interstate rates that would move this traffic." (R. 125)

On this promise, however, the trunk lines never performed. On the contrary, having failed themselves to show what the interstate rates would be for this particular switching of coal for a few miles in Youngstown, they took the position that a showing by others would be irrelevant. (R. 180) Obviously, they considered the information irrelevant only when they finally awoke to the fact that the charges which they had promised later on to show, were utterly extortionate.

The reason for these extraordinary rates for this switching of coal in interstate commerce was frankly admitted by these same trunk lines in another proceeding, contemporaneously heard by the Ohio Commission, where the trunk lines attempted to cancel the intrastate switching rates and to substitute therefor the interstate rates of $94.50 per car. They there stated, with respect to the suspended schedules, that those schedules:

> "definitely exclude from the application of reciprocal switching rates and regulations coal and coke, carloads, ex Y .& S., and because respondents had never intended to switch these commodities for the Y. & S."
>
> "The rules proposed in the suspended schedules may be briefly summarized with a statement that they merely revise the language of existing provisions relating to switching arrangements between the Y. & S. Rail-

road and steam railroads at Youngstown applicable on traffic road hauled to that point by the Y. & S. Railroad in a way that would clearly denote the fact that respondents, for reasons heretofore stated, do not wish to switch the involved commodities for the Y. & S. Railroad."

See Investigation and Suspension Docket No. 142, *Switching Rates and Service at Youngstown, Ohio;* No. 8833, *The Youngstown and Suburban Railway Company* v. *The Baltimore and Ohio Railroad Company, et al.*, decided January 26, 1935; 1935 Annual Report, P. U. C. Ohio; order upheld in *Baltimore & Ohio Rd. Co., et al.* v. *Public Utilities Commission of Ohio*, decided December 11, 1935, 130 O. S. 258; 8 Ohio Bar 38.

It is to be observed that in that contemporaneous proceeding before the Ohio Commission, the order of the Commission required the maintenance of intrastate switching rates as then in effect and forbade their increase to the impossibly high level which the trunk lines maintain with respect to the interstate traffic on coal. That order of the Ohio Commission was appealed by the trunk lines to the Supreme Court of Ohio, and was there held to be lawful, in the decision cited above.

Proceedings before the District Court.—The application of the appellants to the District Court below, although originally assigned to be heard on May 11, 1935, was not heard on that date because of the incapacitation of two of the judges; it was finally heard and submitted on September 23, 1935, following which the final decree was entered on December 11, 1935.

Reply to appellants' argument.

Appellants' lengthy discussion on the subject of what is commerce overlooks that the question here is,—what is commerce subject to the Interstate Commerce Act and to regulation by the Interstate Commerce Commission?

However, out of that discussion we quote such words and phrases as,—

> "Interchange of goods,—
> Between traders and merchants,—
> Those who have and those who desire to acquire,—
> Exchange,—
> Owner and prospective buyer,—
> Article of trade,—
> Intercourse,—
> Carried on between man and man,—
> Commercial intercourse,—
> Buying and selling,"

as clearly indicating that commerce, as these appellants themselves understand it, contemplates a plurality of persons and a dealing between persons. Such words can have no reference whatever to a matter which is strictly and solely the private affair of one,—which is the case in the mines to Negley movement of the raw run-of-mine coal here.

But further on this subject, we are constrained to submit that in their quotations from *Coe* v. *Errol,* 116 U. S. 517, appellants overlook the very essential point that the court was there contemplating *common* carrier transportation. The Court said.(p. 527):

> "What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely: that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a *common* carrier for transportation to another State or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject." (Italics ours)

In the case at bar, there was no common carrier transportation between the mines and Negley, nor was there any

dealing; therefore, there was no commerce, and certainly no commerce subject to the Interstate Commerce Act and to regulation by the Interstate Commerce Commission.

VI. *THE SOUTHERN PACIFIC TERMINAL CASE* AND OTHER CASES RELIED UPON BY THE APPELLANTS ARE NOT HERE IN POINT, AND NOT AT ALL CONTROLLING.

The case principally relied upon by the appellants is the *Southern Pacific Terminal case,—Southern P. Terminal Co.* v. *Interstate Commerce Com.,* 219 U. S. 498, decided February 20, 1911.

It is only fair to add, however, that the great reliance of the appellants upon this case is tempered by reservations. They argue that "There is sufficient of resemblance" between the *Southern Pacific terminal case* and the case at bar to advance it; they make no contention that the case is "on all fours"; and they conclude their presentation with the suggestion merely that the *Southern Pacific terminal case* is "well worthy of consideration and of application in principle in the case at bar."

The truth is that the *Southern Pacific terminal case* is not here apropos at all and this is at once seen from even a cursory analysis of the extended statement of the facts which precedes the court's opinion (pp. 499-507). From this it appears that the question there involved was

> "undue preferences and advantages," which were found by the Interstate Commerce Commission to have been given a shipper, one E. H. Young by the appellant, Southern Pacific Terminal Company, * * * "through failure to exact from him payment of wharfage charges * * * while at the same time exacting such charges from other shippers:"

and also,—

> "from giving and allowing him * * * for his exclusive use, space on the wharves * * * while contemporane-

ously refusing and denying similar privileges to other shippers." (p. 499)

The lands upon which the terminal facilities were located had been granted and conveyed subject to an express covenant requiring,—

> "the construction of terminal facilities upon the property * * * for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems" (p. 500), and the lands were in fact pledged to such public use. (pages 518, 525)

Next, because,—

> "it was greatly to the interest of the city"

streets were ordered to be closed by Galveston city ordinance so as to—

> "maintain upon the property terminal facilities for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems, their successors or assigns." (pp. 500-501)

> "The Southern Pacific Terminal Company is a Texas corporation, organized * * * to construct and maintain upon the property terminal facilities for the use of what are commonly called the Southern Pacific Railroad and Steamship systems." (pp. 501-502)

> "Import and export traffic passing through Galveston passes over the wharves of the terminal company, and the only track facilities for such traffic are those owned by the terminal company on its own lands. And the Galveston, Harrisburg & San Antonio Railway is the only railway having physical connection with the tracks of the terminal company, and it does all of the switching to and from the tracks of the terminal company, charging $1.75 per car. The latter company receives a trackage charge of 50 cents per car. (pp. 502-503)

> "The terminal company * * * carries on a wharfage business and publishes a schedule of charges for

such business, which, however, is not filed with the Interstate Commerce Commission * * *." (p. 503)

"Such tariffs do not show that any exception is made as to the docks occupied by E. H. Young, * * *." (p. 503)

"The terminal company was a party to numerous circulars issued by the Southern Pacific Companies, known as the 'Sunset Route,' so termed, principally for advertising purposes. The circular of May 24, 1907 shows terminal charges (other than storage and switching). At the port of Galveston the circulars show a charge of one cent per 100 pounds on cotton-seed cake and meal." (p. 503)

There is "a lease under which Young is to pay the terminal company a yearly rental of $15,000." (p. 504)

"Young has certain advantages by reason of his contract with the terminal company * * *." (p. 505)

On these facts the court recognized a primary question to be whether or not this particular terminal facility and traffic over it was subject to the Interstate Commerce Act and the regulation of the Interstate Commerce Commission. (pp. 516-517) It determined that the terminal facilities and the traffic over the same were subject to that Act and to such regulations. The Court said (pp. 522-523):

"As was well said by the Interstate Commerce Commerce Commission: * * * The terminal company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority.'

> The reasoning of the Commission is justified by the statute. It includes in the term 'railroad' "all bridges and ferries used or operated in connection with any railroad, and also all the roads in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any said property."

How utterly inept is appellants' reliance upon this *Southern Pacific Terminal case* becomes glaringly apparent when comparison of the facts there and here is made. The facilities of the Pittsburgh Coal Company are not in any way charged with a public interest, but are its purely private property, erected upon its own lands, acquired by private purchase. The coal company is a private corporation, and is neither by charter nor practice a common carrier. Its facilities were constructed to handle and do handle no business except its own. It does not hold itself out to do a public business, it does no such business, and it neither publishes nor files with the Interstate Commerce Commission any tariff of rates and charges applicable to such business. It shares in no division of the rates of any common carrier. It leases none of these facilities to others and needs no lease itself, for it owns the facilities.

It may be that appellants fondness for the *Southern Pacific Terminal case* results from the quotation by this Court therein of that language of Section 1 (3) of the Interstate Commerce Act, as it then was, which includes in the term 'railroad':

> "* * * all the road in use by any corporation operating a railroad * * *." (see page 523)

If that be their principal reliance, it overlooks, first, that the only railroads covered by the Act are, by Section 1 (1),

common carrier railroads; but, more important, it also overlooks that by the amendments of 1920, the word "corporation" was stricken, and the words "common carrier" inserted in lieu thereof so that the phrase quoted above now reads in Section 1 (3):

> "* * * all the road in use by any common carrier operating a railroad * * *."

Thus Section 1 in double barrelled fashion excludes private tracks like that of the Pittsburgh Coal Company, from regulation as a common carrier. It may be pointed out in this connection that the Coal Company has long owned and operated other private tracks which it also uses in this particular movement, one being 6.5 miles long, extending from the mine in Pennsylvania to the Company's tipple on the Monongahela River. (R. 146, 151-152) Furthermore, the existence of private tracks of this kind is expressly recognized, and they are expressly protected by Congress in Section 1 (9) of the Interstate Commerce Act. And this Court held, in *Cleveland, C. C. & St. L. R. Co.* v. *United States,* 275 U. S. 408, that paragraph (9) is in no way affected by paragraph (22) of Section 1.

The authorities, including the *Southern Pacific Terminal case,* relied upon by the appellants in this Court are the same as have been relied upon by them throughout this litigation. Each of those cases was advanced before the Ohio Commission and received painstaking consideration at its hands. Because of this we shall not extend this brief unduly by a detailed argument to show that these cases are not in point, but will refer instead to the disposition thereof made by the Ohio Commission in its report as follows:

> *Coe* v. *Erroll,* 116 U. S. 517 (see R. 31).
> *Baltimore & O. S. W. R. Co.* v. *Settle,* 260 U. S. 166 (see R. 35).
> *Pennsylvania R. Co.* v. *Clark Bros. C. M. Co.,* 238 U. S. 456 (see R. 34).
> *South Covington & C. Street R. Co.* v. *Covington,* 235 U. S. 537 (see R. 13).

Railroad Commission v. *Texas & P. R. Co.*, 229 U. S. 336 (see R. 33).
Southern P. Terminal Co. v. *Interstate Com. Com.*, 219 U. S. 498 (see R. 32-33).
United States v. *Erie R. Co.*, 280 U. S. 98 (see R. 36-37).
Railroad Commission v. *Worthington*, 225 U. S. 101 (see R. 32)
Baer Bros. Mercantile Co. v. *Denver & R. G. R. Co.*, 233 U. S. 479 (see R. 34).
Champlain Realty Co. v. *Brattleboro*, 260 U. S. 366 (see R. 27).
Texas & N. O. R. Co. v. *Sabine Tram Co.*, 227 U. S. 111 (see R. 33)
Kirmeyer v. *Kansas*, 236 U. S. 568 (see R. 31-32).

The *Florida Oil case*, which is recited and relied upon by these appellees, *supra*, has also been cited by the appellants and on that score was discussed at length by the Ohio Commission in its report at R. 13, 35-36. The *Social Circle case*,—*Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, is too well known in its real points to merit discussion in this controversy.

VII. COMMON CARRIER TRANSPORTATION OF A PREPARED PRODUCT IN INTRASTATE COMMERCE DOES NOT LOSE ITS INTRASTATE CHARACTER AND BECOME INTERSTATE COMMERCE BECAUSE THE RAW COMMODITY FROM WHICH THE PREPARED PRODUCT WAS PROCESSED, WAS INTENDED WHILE IN THE COURSE OF ITS MOVEMENT INTO THE STATE BY THE PRIVATE FACILITIES OF THE OWNER, TO BE PROCESSED AND THEN SOLD IN THAT STATE.

The president of the coal company stated before the Commission that the intention of his company has been, and is,

to sell the prepared coal out of the Negley plant to consumers at destinations beyond, in Ohio and elsewhere. (R. 164-165, 167-168)

When the raw run-of-mine coal is mined in Pennsylvania, and when it comes into the Negley plant in Ohio, however, none of it is consigned, or could it be consigned, to any particular person, nor it there any pre-determined destination. (R. 147, 149, 150-151, 157-158) Indeed, as already said, it has not theretofore been consigned or destined at all, for it has always and at all times been in the ownership, possession, and control of the Pittsburgh Coal Company, for preparation as the trade might require, in its own plant at Negley. Moreover, it could not be prepared in the manner the trade requires, except at Negley, for the necessary preparation facilities are nowhere else available for this coal. (R. 149, 153-154)

Because there is, in the course of the private movement of the coal from the mines in Pennsylvania to the Negley plant, an intent on the part of the Pittsburgh Coal Company ultimately to sell it in refined form to some person located at some point in Ohio or some other state, the trunk lines contend that the coal is in commerce, and in interstate commerce, during the movement from the mines to Negley, and that therefore the subsequent commerce involved in the transportation from Negley to Youngstown is interstate, and subject to the Interstate Commerce Act. (R. 230)

This contention is explicitly denied by the numerous controlling decisions to which we have already adverted. In practically every one of them the "continuing purpose and intent of the shipper and owner to sell or otherwise commercially dispose of" the commodity,—the circumstance so greatly stressed by these appellants in the instant case,—was present. Yet in all of those cases, the courts and the administrative bodies have uniformly held the transportation to be intrastate.

Thus, in the *Pipe Line cases, supra,* the private movement of the oil in the owner's private facilities was to the own-

er's refinery, analogous to the Pittsburgh Coal Company's Negley preparation plant here. Yet that private movement was held not even to constitute transportation, let alone commerce, although, as Chief Justice White very pertinently observed (p. 562), it was always intended that the refined oil there, like the prepared coal here, should ultimately be sold and shipped in commerce.

In the *McCluskey case, supra,* this Court said:

> "In the case at bar there was no initial shipment of the goods. The transportation of the poles from the forest in which they were cut to tidewater, where they were sold, was not a shipment." (page 39)

Again, the intent to sell the commodity at the termination of its private movement was obviously present during that movement. And so here, as in the *McCluskey case,* the private movement of the commodity, the run-of-mine coal from the mine, wherein it was mined, to Negley, where it was prepared and sold, was not a shipment.

In the *Florida Oil case, supra,* the ultimate delivery points of the inbound oils were the ports of entry, Port Tampa and Jacksonville. But contemporaneously with that movement by private tank steamers, it was always intended and known that the oil would, in its original form, move beyond those ports of entry to over 100 destinations throughout Florida. In fact, the oil sometimes was loaded from the ocean vessel directly into the common carrier tank cars for common carrier movement to ultimate Florida destinations; in other cases the common carrier tank cars were being loaded out of storage tanks into which the oil was being simultaneously pumped from the ocean vessel. Yet in every instance, that Florida intrastate transportation was held to be intrastate commerce. Here, although the "continuing purpose and intent" to market the coal beyond Negley was present during the private movement to Negley, it was present not with respect to the run-of-mine coal, but to some product thereof, to be prepared at Negley, the

only place where it could be so prepared, to meet the requirements of the ultimate purchaser.

In the *Campbell River Mills case, supra*, all of the movement of the logs from the standing timber to Columbia Valley, the point of common carrier shipment on the Milwaukee road, was by the facilities of the Mills Company except that the logging trucks which were taken by the Mills Company from Columbia Valley into the timber empty and returned loaded, were the property of the Milwaukee road.

There was no dealing whatever with respect to these logs until they were shipped by the Mills Company over the Milwaukee from Columbia Valley to Bellingham for disposition to purchasers there or beyond. But such disposition was always in contemplation from the inception of the private movement of the logs from the woods. In the case at bar the facts showing a solely private movement of the commodity up to the point of common carrier shipment in the state of sale, are even stronger, for here even the equipment, water and rail, in which the coal was moved was in every instance owned by the Pittsburgh Coal Company, which also owned the coal.

The Interstate Commerce Commission in deciding the *Friedman case, supra*, recognized that the commodity (scrap iron owned by the Southern Railway) which was originally transported by the Southern Railway, was covered by the usual bill of lading. But even so, the Commission said that it was not in law a bill of lading contract because it was a document in which the Southern dealt with itself. Thus the fact that the Southern Railway covered the shipment with the usual bill-of-lading contract showing that the scrap iron was to go to a purchaser beyond its own rails, did not put the transportation thereof upon the Southern in the classification of commerce. The scrap iron did not enter into commerce until it passed beyond the rails of the Southern and commerce therefore commenced within the state of Kentucky on the rails of

the connecting carrier, the Chesapeake & Ohio. This was so despite the fact that, as evidenced by the bill of lading, there was a continuing intent and purpose that the scrap iron was to be delivered to the Chesapeake & Ohio for the purchaser without further intervention by the Southern.

In the *Crowley case, supra,* the report of the Commission shows that the animals shipped were wild range animals "suitable only for slaughter in making animal products, such as dog food." (p. 222) It was therefore known when they were driven across the international boundary from Mexico to California shipping points that there was some destination beyond, at the slaughtering points. Nevertheless the Commission found no difficulty on the doctrine of the *Campbell River Mills case* in concluding that the rail transportation from California points to California points was intrastate. The "continuing intent and purpose" when the animals were driven from Mexico into California to market them beyond the rail shipping points did not make of the California intrastate transportation anything other than intrastate commerce.

These cases, culled from those cited in support of our Propositions II. and III. do not exhaust the authorities on this particular subject. Another case directly in point is *Arkadelphia Milling Co.* v. *St. L. S. W. R. Co.,* 249 U. S. 134. In that proceeding timber was logged in Arkansas and moved by railroad to a mill in Arkansas, where it was manufactured and stored pending final transportation to market. The question was whether, because of the final movement, that first movement of the logs from the timber to the mill, within Arkansas, was interstate commerce. It appeared that "about 95 per cent of the sale of finished articles, that is, of the total outbound shipments, were made for delivery at points outside the state of Arkansas, the remaining 5 per cent being sold and delivered, or shipped to points within the state of Arkansas." (p. 150) It further appeared that "all of them (the shippers) knew

and intended at the time they brought the rough material into the mill, on account of previous course of dealings in the business, that 95 per cent of the finished product would be by them shipped to points outside the state of Arkansas." (p. 151) In the face of these facts this Court was of the opinion that the transportation of the rough material from the timber to the mills was intrastate Arkansas commerce. The Court said:

> "• • • the fact that previous experience indicated that 95 per cent of it must be marketed outside of the state, so that this entered into the purpose of the parties when shipping the rough material to the mill, did not alter the character of the latter movement. *The question is too well settled by previous decisions to require discussion.*" (pp. 151-152; italics ours)

Almost twenty years ago, therefore, this Court stated without reservation that the point here relied upon by these appellants was without merit, and in the face of that statement any further discussion of authorities to support our position would be superfluous. We respectfully submit that any purpose and intent on the part of the Pittsburgh Coal Company, in the course of its private movement of its run-of-mine coal to Negley, sometime to market the prepared product thereof at points beyond Negley and by common carrier transportation in Ohio did not make interstate commerce of that Ohio transportation.

VIII. THE STATE OR INTERSTATE CHARACTER OF THE COMMERCE IN THE TRANSPORTATION OF THIS COAL FROM NEGLEY TO YOUNGSTOWN DOES NOT DEPEND UPON THE ASSESSMENT OR NON-ASSESSMENT OF DEMURRAGE FOR THE DETENTION OF EMPTY OR LOADED CARS AT THE NEGLEY PLANT.

The point advanced by the appellants is that these particular shipments of coal "were actually treated by car-

riers controlled by the shipper, as in interstate commerce."

On this general subject we first say that this is not a commodities clause proceeding, nor is there any such proceeding pending anywhere, to our knowledge, with respect to the intercorporate relationship of the Pittsburgh Coal Company, the Lisbon and the Y. & S. Moreover, this court has recognized that mere ownership by a railroad company of capital stock, or the controlling capital stock of a mining company does not necessarily violate the commodities clause,—see *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 272-273; *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 529; *United States* v. *Reading Co.*, 253 U. S. 26, 62-63;—*a fortiori*, the ownership by the mining company of the stock of railroad companies. The law of Ohio is to the same effect.

The demurrage rules involved are not at all rules peculiar to the two short lines, either as respects their publication or their application. They constitute a Uniform Code published by the American Railroad Association Tariff Bureau (R. 175-176), have been long applicable on all railroads throughout the country on both state and interstate traffic, and were recognized by this court as a uniform code so far back as 1912. *Procter & Gamble Co.* v. *United States*, 225 U. S. 282, 286. Their uniform application is policed by territorial policing organizations, of which the Eastern Demurrage and Storage Bureau operates in the territory here involved, and the Lisbon and Y. & S. come within its jurisdiction. (R. 175-180, 205-209)

This Uniform Demurrage Code, insofar as here involved, provides:

> "Section A. "Cars of either railroad or private ownership held for or by consignors or consignees for loading, unloading, forwarding directions or for other purposes, (including cars held for loading company material unless the loading is done by the railroad for which the material is intended and on its tracks) are subject to these demurrage rules except as provided in Section B." (R. 177)

In such exceptions is found:

> "Section B, Item 3. Empty cars placed for loading coal, coal blocks, coal brickettes or coal boulets, at coal mines, coal mine sidings or coal washers or for loading coke at coke ovens, when the washers or ovens are located at or adjacent to the mines producing the coal to be washed or to be used in making coke, and such cars under load with such commodities at such mines, mine sidings, coal washers or coke ovens." (R. 176)
>
> "Note 2. Coal washers and coke ovens shall not be considered as adjacent to coal mines when the coal to be washed or to be used in making coke is moved from the mines to the washers or coke ovens under freight tariff rates." (R. 176)

It is of interest to observe that this railroad tariff definition of the word "adjacent" goes beyond the bare dictionary meaning, and is based upon one of the principal points here relied upon by the Ohio appellees,—*i. e.*, that a movement not under freight tariff rates is not a common carrier movement and is not commerce.

Applying these Sections A and B and Note 2 to the latter to the traffic here involved, the Y. & S. "considered that the cars placed at this coal washery (at Negley) for loading or held under load are exempt from demurrage." (R. 176-177) It so advised the Eastern Demurrage and Storage Bureau in response to the latter's circular to all railroads on the subject (apparently fortuitously issued just after the movement of the four cars in question, on September 21, 1934) in the following language (R. 209):

> "Our interpretation of this tariff provision is that this coal washing plant at Negley, O., must be considered as adjacent to the mines which produce the coal as the coal has not moved from the mines to the washing plant under freight tariff rates, and we consider the cars placed for loading coal at this particular washing plant are exempt from demurrage charges under the tariff as it now stands."

Acknowledging this statement of its practice by the Lisbon, the Manager of the Bureau advised in reply that (R. 207-208):

> "It is not our purpose to take issue with your interpretation in connection with the coal washery at Negley, Ohio, which handles coal coming from barges on the Ohio River, which is moved from the mines to the washing plant over facilities and in equipment owned entirely by the company operating the washing plant—at least, not unless and until the A. R. A. takes cognizance of such situation which would obligate us to again bring it to your attention."

Thus, it will be observed, the practice of the Lisbon with respect to the exemption from demurrage of cars placed for loading or under load at the Negley plant is clearly within the precise language of the uniform demurrage rules of all carriers, including these appellants; and the railroad organization which has charge of policing the subject in this particular territory takes no issue with that practice.

Further, and by way of specific reply to the charge that the Lisbon "treated" these shipments, insofar as demurrage is involved, as interstate commerce, we say that this is necessarily so, because the rules governing demurrage are the same on both state and interstate commerce, being uniform in their application.

Conclusion.

For all of which these appellees respectfully submit that the order of the Ohio Commission is a lawful order; that the District Court committed no error in refusing to enjoin it; and that the decree of the District Court ordering

the petition below dismissed, and at the costs of the plaintiffs, should be affirmed.

Respectfully submitted,

JOHN W. BRICKER,
DONALD C. POWER,
Solicitors for Ohio Appellees,

Attorney General of Ohio,
and
The Public Utilities Commission of Ohio.

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Of Counsel.

April 3, 1936.

APPENDIX.

Pertinent Portions of Statutes Cited.

Ohio General Code, Section 503.

"This chapter shall not apply to street and electric railroads engaged solely in the transportation of passengers within the limits of cities, or other private railroads not doing business as common carriers."

Pennsylvania Public Service Company Law, No. 854, Article 1, Section 1.

"The term 'Public Service Company,' when used in this act, includes all railroad corporations, * * * common carriers, * * * doing business within this State, and also all persons engaged for profit in the same kind of business within this Commonwealth; * * *

The term 'Railroad Corporation', as used in this act, includes every corporation owning, leasing, operating, or managing or controlling, any railroad for public use within this Commonwealth.

The term 'Railroad', as used in this act, includes every railroad other than a street railway, by whatsoever power operated, for public use in the conveyance of passengers or property, or both, with all bridges, ferries, tunnels, facilties, plant, and equipment thereof.

The term 'Common Carrier', as used in this act, includes any and all common carriers, whether corporations or persons, engaged for profit in the conveyance of passengers or property, or both, between points within this Commonwealth, by, through, over, above, or under land or water, or both. * * *"

Interstate Commerce Act, Part I, Section 1 (1).

"That the provisions of this part shall apply to common carriers engaged in—(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or

partly by pipe line and partly by railroad or by water; * * *;"

Interstate Commerce Act, Part I, Section 1 (3).

"The term 'common carrier' as used in this part shall include all pipe-line companies; express companies; sleeping car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word 'carrier'' is used in this part it shall be held to mean 'common carrier.' The term 'railroad' as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Interstate Commerce Act, Part I, Section 1 (8).

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities

as may be necessary and intended for its use in the conduct of its business as a common carrier."

Interstate Commerce Act, Part I, Section 1 (9).

Any common carrier subject to the provisions of this part, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper or owner of such lateral, branch lines of railroad, such shipper or owner of such lateral, branch line of railroad may make complaint to the Commission, as provided in section thirteen of this part, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, as provided in section fifteen of this part, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission other than orders for the payment of money.

Interstate Commerce Act, Part I, Section 1 (18)-(22).

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over

or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operated.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation,

or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Interstate Commerce Act, Part I, Section 6 (1).

"That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee. Such schedule shall be plainly printed in large type and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part."

Interstate Commerce Act, Part II, Section 203 (14).

"The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or for-

eign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of Part I."

Interstate Commerce Act, Part II, Section 203 (15).

"The term 'contract carrier by motor vehicle' means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation."

Interstate Commerce Act, Part II, Section 203 (16).

"The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle."

Interstate Commerce Act, Part II, Section 203 (17).

"The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise."